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Board of Education v. Rowley: Are Handicapped Children Entitled to Equal Education Opportunities

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Board of Education v. Rowley: Are Handicapped Children Entitled to Equal Educational Opportunities?

INTRODUCTION

In 1975, the Education for All Handicapped Children Act (EAHCA) was enacted by Congress.[1] This legislation provides federal assistance to those states which have in effect a policy assuring all handicapped children the right to a free appropriate education.[2] The Act itself, however, does not set forth the specific provisions constituting a "free appropriate education." Congress purposely refrained from mandating overly detailed programs to allow each state to define the scope and details as to what constitutes an appropriate education.[3] As a result, ambiguity regarding the proper definition ensued, and the courts have grappled with this difficult issue since the passage of the EAHCA.[4] In *Board of*

1. 20 U.S.C. §§ 1401-1461 (1976).

2. To qualify for this assistance the state must, inter alia; (1) have developed a plan which sets forth the policies and procedures which it will, or has undertaken in order to assure that: (a) there is an established goal of providing full educational opportunities to all handicapped children along with a timetable and a description of the facilities necessary to accomplish such a goal, (b) a free appropriate education will be available to all handicapped children by specific dates, and (c) all handicapped children are identified, located and evaluated; (2) have established priorities to serve those with the most severe handicap who are receiving an inadequate education first; and (3) to the maximum extent appropriate educate handicapped children with non-handicapped children (commonly referred to as "mainstreaming"). *Id.* at § 1412. For a further discussion of the requirements of the Act, *see* Stark, *Tragic Choices in Special Education: The Effect of Scarce Resources on the Implementation of Pub. L. No. 94-142*, 14 CONN. L. REV. 477, 481-84 (1982) [hereinafter cited as Stark].

3. Kruelle v. New Castle County School Dist., 642 F.2d 687, 691 (3d Cir. 1981). Several reasons have been advanced for Congress' reluctance to prescribe specific standards. The most obvious is the tremendous variety of needs presented by children with different handicaps. There is also the lack of agreement among educators as to what programs are most effective. The most significant reason is the traditional notion that education is primarily a state and local concern. Note, *Enforcing the Right to an "Appropriate" Education: The Education For All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103, 1108-09 (1979); 121 CONG. REC. 19,498 (1975) (remarks of Sen. Dole).

4. *See e.g.*, Kruelle v. New Castle School Dist., 642 F.2d 687 (3d Cir. 1981); Springdale School Dist. No. 50 v. Grace, 656 F.2d 300 (8th Cir. 1981), *cert. denied*, 103 S. Ct. 2086 (1983); Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980), *cert. denied sub nom.* Scanlon v. Battle, 452 U.S. 968 (1980); Rowley v. Board of Educ., 632 F.2d 945 (2d Cir. 1980) (*per curiam*) (Mansfield, J., dissenting), *rev'd and remanded*, 102 S. Ct. 3034 (1982); Campbell v. Talladega County Board of Educ., 518 F. Supp. 47 (N.D. Ala. 1981); Gladys v. Pearland Indep. School Dist., 520 F. Supp. 869 (S.D. Tex. 1981); Pinkerton v. Moye, 509 F. Supp. 107 (W.D. Va. 1981); Kruelle v. Biggs, 489 F. Supp. 169 (D. Del. 1980), *aff'd sub nom.* Kruelle v. New Castle School Dist., 642 F.2d 687 (3d Cir. 1981); Rowley v. Board of Educ., 483 F. Supp. 528 (S.D.N.Y. 1980), *aff'd*

Education v. Rowley,[5] the U.S. Supreme Court has ostensibly ended the long search for the proper definition.

In *Rowley*, an eight-year old deaf girl sought to have a sign language interpreter assigned to her during school. Without the interpreter, she was performing well. However, her performance would have been greatly enhanced with the assistance of the interpreter.[6] The Court held that a free appropriate education does not require a state to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children.[7] As a result, Amy was not entitled to the assignment of an interpreter. The decision was based on the Court's interpretation of the Act's legislative history.[8] This Note suggests the Court misinterpreted the legislative intent, thus failing to provide for a "free appropriate education" as Congress intended.

This Note will review the development of the Act prompted by the legislature, as well as case law. An historical discussion of the *Rowley* case, including factually and legally relevant information will follow. Finally, the legislative intent behind the Act will be explored. Such analysis will show the Supreme Court misinterpreted Congress' intentions and purposes behind passing the Act.[9]

I. THE HISTORY OF THE EAHCA

The problem of educating the handicapped was first addressed by Congress in 1966.[10] At that time, the existing Elementary and Secondary School Act of 1965 was amended to include Title VI-Education of the Handicapped.[11] One of its primary purposes was to assist the states in the "initiation, expansion, and improve-

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per curiam 632 F.2d 945 (2d Cir. 1980), *rev'd and remanded*, 102 S. Ct. 3034 (1982); Armstrong v. Kline, 476 F. Supp. 583 (E.D. Pa. 1979), *remanded sub nom*. Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980), *cert denied sub nom*. Scanlon v. Battle, 452 U.S. 968 (1980).

5. 102 S. Ct. 3034 (1982).

6. *See id*. at 3040.

7. *Id*. at 3046.

8. *Id*. at 3037.

9. "[T]he majority's standard for a 'free appropriate education' and its standard for judicial review disregard congressional intent." *Id*. at 3054 (White, J., dissenting).

10. Studies conducted by the Senate Committee on Labor and Public Welfare and other interested organizations found there was very little effort on the part of the federal government to initiate or strengthen programs for handicapped children. The programs which could aid in the education of handicapped children were ineffective in that respect, and were fragmented and scattered across a variety of administrative units within the Office of Education. S. REP. No. 634, 91st Cong., 2d Sess. 2, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 2768, 2832.

11. Elementary and Secondary Education Amendments of 1966, Pub. L. No. 750, 80 Stat. 1191 (1966), *repealed by* Education of the Handicapped Act, Pub. L. No. 230, 84 Stat. 175 (1970), *amended by* Education of the Handicapped Amendments of 1974, Pub. L. No. 380, 88 Stat. 579 (1974), *amended by* 20 U.S.C. §§ 1401-1461 (1976).

ment of programs and projects . . . for the education of handicapped children."[12] In 1970, Congress repealed that Act and enacted the Education of the Handicapped Act.[13] Both Acts were aimed at encouraging the states to develop programs for the education of the handicapped.[14] The catalyst which initiated the introduction of the EAHCA was two landmark decisions in 1972, in the U.S. District Court, recognizing the need for special educational services of handicapped children.[15]

In *Pennsylvania Association for Retarded Children v. Pennsylvania* (PARC),[16] the plaintiffs, joined by their parents and the Pennsylvania Association for Retarded Children, brought a class action seeking declaratory judgment. They sought to have statutes pertaining to the exclusion of retarded children from public education and training declared unconstitutional.[17] In addition, they sought a permanent injunction against the enforcement of such statutes.[18] The statutes were challenged by plaintiffs as constitutionally infirm on their face and as applied.[19] In addition, plaintiffs alleged that the use of these statutes to exclude retarded children from public school contravened the intent of the statutes.[20] The parties eventually agreed to a stipulation which was approved and adopted as fair and reasonable to all members of both parties. The stipulation essentially provided access to public

12. Elementary and Secondary Education Amendments of 1966, Pub. L. No. 750, 80 Stat. 1191, 1204 (1966).

13. Education of the Handicapped Act, Pub. L. No. 230, 84 Stat. 175 (1970), *amended by* Education of the Handicapped Amendments of 1974, Pub. L. No. 380, 88 Stat. 579 (1974), *amended by* 20 U.S.C. §§ 1401-1461 (1976).

14. Board of Educ. v. Rowley, 102 S. Ct. 3034, 3037 (1982).

15. Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972); Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972).

16. 343 F. Supp. 279 (E.D. Pa. 1972).

17. The statutes which they challenged provided that: (l) The State Board of Education was relieved from any obligation to educate a child deemed uneducable or untrainable by a school psychologist; (2) an indefinite postponement of admission to public school was allowable for any child who had not attained a mental age of five years; (3) any child whom a school psychologist found unable to profit from compulsory school attendance appeared to be excused; and (4) compulsory school age which was defined as eight to seventeen years was actually used in practice to postpone admissions of retarded children until age eight, or to eliminate them from public school at age seventeen. *Id.* at 282.

18. *Id.* at 284.

19. Plaintiffs argued that: (1) these statutes offend due process because they lack any provision for notice and a hearing before a retarded person is excluded from public education, (2) two of the provisions violate equal protection because the assumption that certain children are uneducable and untrainable lacks a rational basis in fact, and (3) the Constitution of the State of Pennsylvania guarantees an education to all children and these two sections violate due process by arbitrarily and capriciously denying that right to handicapped children. *Id.* at 283.

20. *Id.* at 284.

schools and training appropriate to the child's capacity.[21]

In *Mills v. Board of Education*[22] an action was brought on behalf of seven school age children by their next friends. The seven named plaintiffs all qualified as "exceptional" children,[23] and had been excluded from publicly supported education due to their individual handicap. It had previously been determined by medical opinion that several of the children would benefit from schooling. They remained however, totally excluded from publicly supported education.[24] They sought a declaration of rights and an injunction against exclusion or denial of publicly supported education. Plaintiffs further sought to compel defendants to provide immediate and adequate public education to the children currently excluded.[25] The court entered summary judgment on behalf of the plaintiffs. The judgment provided, inter alia, that no child could be excluded from a regular public school program by a rule, policy, or practice of the Board of Education unless alternative services suited to the child's individual needs were provided at public expense. Additionally, a constitutionally adequate prior hearing as well as a periodic review of their status, progress and a determination of the adequacy of the educational alternative had to be provided.[26]

These decisions coupled with the lack of progress made under either of the prior federal acts[27] prompted Congress to take further action. In 1974, Congress increased federal funding for education of the handicapped.[28] For the first time they required recipient states to adopt "a goal of providing full educational op-

21. *Id.* at 284-86. The district court held that the plaintiffs had established a colorable claim under the due process clause. It cited Wisconsin v. Constantineau, 400 U.S. 433 (1971), where the United States Supreme Court held that due process requires notice and a hearing whenever the state labels a person in a stigmatizing fashion. Due to social attitudes, exclusion from school, such as in the *PARC* case, constitutes that very type of stigma. *Id.* at 295. The court also held that there was a colorable claim as to the non-existence of a rational basis for the exclusion of plaintiffs, and therefore a valid equal protection claim. *Id.* at 297. *See* Haggerty & Sacks, *Education of the Handicapped: Towards a Definition of an Appropriate Education*, 50 TEMP. L.Q. 961, 967-69 (1977).

22. 348 F. Supp. 866 (D.D.C. 1972).

23. The label "exceptional" applies to mentally retarded, emotionally disturbed, physically handicapped, hyperactive and other children with behavioral problems. *Id.* at 868.

24. *Id.* at 869-70.

25. *Id.* at 868.

26. *Id.* at 878.

27. Elementary and Secondary Education Amendments of 1966, Pub. L. No. 750, 80 Stat. 1191 (1966) (repealed 1970); Education of the Handicapped Act, Pub. L. No. 230, 84 Stat. 175 (1970) (current version at 20 U.S.C. §§ 1401-1416 (1976).

28. Education of the Handicapped Amendments of 1974, Pub. L. No. 380, 88 Stat. 579 (1974), *amended by* 20 U.S.C. §§ 1401-1461 (1976).

portunities to all handicapped children."[29] This statute was only an interim measure designed to allow Congress an additional year to consider what, if any, additional federal assistance was required to enable the states to meet the needs of the handicapped children.[30] As a result of the study, the Education for All Handicapped Children Act of 1975 ensued.[31]

II. THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT

The purpose of the EAHCA is to provide a "free appropriate education" to all handicapped children between the ages of three and twenty-one.[32] "Handicapped children" is defined in the Act to include those who are "mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities."[33] A "free appropriate public education" includes special education[34] and related services[35] provided at public expense under public supervision which meet the standards of the state educational agency and are in conformity with an individualized educational program which meets the unique needs of each handicapped child.[36]

Under the EAHCA the local educational agency is required to formulate an individualized educational program (IEP) for each handicapped child.[37] Additionally, the state must establish procedures to assure placement of the child in the least restrictive

29. *Id.* at 583.

30. S. REP. No. 168, 94th Cong., lst Sess. 5, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1429.

31. 20 U.S.C. §§ 1401-1461 (1976).

32. *Id.* at § 1412(2)(B).

33. *Id.* at § 1401(1).

34. "The term 'special education' means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." *Id.* at § 1401(16).

35. The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

Id. at § 1401(17).

36. *Id.* at § 1401(18). For a similar discussion of the purpose of the Act, *see* Note, *Springdale School District No. 50 v. Grace: "Appropriate Education" Under the Education For All Handicapped Children Act*, 15 CREIGHTON L. REV. 950, 955-57 (1982); Stark, *supra* note 2, at 481-84.

37. 20 U.S.C. §§ 1401(19), 1414(a)(5) (1976).

environment.[38]

The least restrictive environment theory, commonly referred to as "mainstreaming," is a significant element of the EAHCA.[39] This concept requires that, to the maximum extent appropriate, handicapped children be educated with nonhandicapped children.[40] The importance of this section is illustrated by the provision that separation is to occur only when the nature of the severity of the handicap prohibits satisfactory achievement by the student in a regular classroom.[41] The achievement by the student can be monitored in conjunction with the system utilized in the IEP program.

The IEP is a written statement prepared by school personnel, in conjunction with the child's parents, to formulate an education plan for the child.[42] This process takes place at the beginning of each school year. Thereafter it is reviewed, and if appropriate, revised periodically to meet the changing needs of the handicapped children.[43] As the child progresses or regresses, the IEP is revised to better serve the child.

In addition to the right to a free appropriate public education offered to handicapped children, their parents are afforded procedural safeguards.[44] These include the right to: examine all relevant records and obtain an independent educational evaluation,[45] require written prior notice whenever a change regarding evaluation or placement is proposed or refused by the educational agency,[46] and an impartial due process hearing if there is a complaint regarding evaluation or placement of their child.[47] The Act

38. *Id.* at § 1412(5)(B).

39. Unlike the other sections of the Act "mainstreaming" is not geared to equal educational opportunities. The goal of this concept is integration. Historically, handicapped children have been isolated, institutionalized, and stigmatized. An historical summary by Dr. Goldberg in *PARC*, 343 F. Supp. 279 at 294 indicated the abuse suffered by handicapped persons in the past. Suggestions were made by various groups around the turn of the century regarding treatment of the handicapped including: segregation, sterilization, and euthanasia. As Dr. Goldberg pointed out, although progress is being made, the stigma remains. "Mainstreaming" is designed to alleviate that stigma by educating handicapped and nonhandicapped children together. *See* Stark, *supra* note 2, at 482 & n. 18.

40. 20 U.S.C. § 1412(5)(B) (1976).

41. *Id.*

42. The IEP includes, whenever appropriate: a statement of present educational performance level, annual goals, specific educational services to be provided, a projected date for initiation and duration of services, and evaluation procedures. *Id.* at 1401(19).

43. *Id.* at § 1414(a)(5).

44. *Id.* at § 1415.

45. *Id.* at § 1415(b)(1)(A).

46. *Id.* at § 1415(b)(1)(C).

47. *Id.* at § 1415(b)(2).

further provides the parents with a right to a series of appeals.[48] In sum, they are given the right to seek and receive an appropriate education for their children.

The Act sets forth various requirements for the states to meet in providing a free appropriate education in order to qualify for federal assistance. The state must assure all handicapped children the right to a free appropriate public education; they must have a goal of providing full educational opportunites to all handicapped children; the handicapped children residing in the state must be identified, located and evaluated, and whenever appropriate handicapped children must be educated with children who are not handicapped.[49] Although the language appears clear on its face, in application, attempts at definitive meanings of the terms "free appropriate education" and "full educational opportunities" have led to anomalous results.[50]

III. CASE LAW CONSTRUING THE ACT

There has been much confusion among the courts in interpreting the provisions of the EAHCA.[51] The language of the Act itself lends little guidance to interpreting the term "free appropriate education." The EAHCA requires that special education and services: (1) be provided at public expense; (2) meet the standards of the state educational agency; (3) include placement in an appropriate preschool, elementary or secondary school; and (4) are in conformity with the particular IEP.[52] Yet these provisions set forth no standard as to what constitutes a "free appropriate education." As a result, the courts have attempted to establish such standards for making this determination.[53] Due to the concern for meeting the "unique needs" of handicapped children, detailed programs were not mandated by Congress since each child's needs are different.[54] The scope and details of what constitutes an appropriate education were left primarily to state definition.[55] Therefore, courts have grappled with establishing some standard by which to measure whether an appropriate education is being offered.

Prior to the Supreme Court's decision in *Rowley*, several federal

48. *Id.* at § 1415(b)(2),(c),(e)(2).
49. This list is not comprehensive. For a listing of all the necessary requirements, *see id.* at § 1412.
50. *See infra* notes 58-63 and accompanying text.
51. *See infra* notes 56-63 and accompanying text.
52. 20 U.S.C. § 1401(18) (1976).
53. Springdale School Dist. No. 50 v. Grace, 656 F.2d 300, 304 (8th Cir. 1981).
54. Kruelle v. New Castle School Dist., 642 F.2d 687, 691 (3d. Cir. 1981).
55. *Id.*

district courts,[56] as well as federal courts of appeals,[57] had attempted to define the obscure term "free appropriate education." Various definitions were formulated including: realization of learning potential,[58] fulfilling the unique needs of each handicapped child,[59] full potential commensurate with the opportunities provided nonhandicapped children,[60] attainment of self-sufficiency,[61] achieving standards which were set with reference to objectives established for nonhandicapped,[62] and maximization of educational capabilities as best as practicable.[63] While all these definitions vary, the common theme seeks a certain achievement level for each handicapped child based on their unique needs. The quest for what the goal should be has ended with the *Rowley* decision.

The Rowley Decisions

Amy Rowley was an eight-year old child deaf since birth. Like

56. Campbell v. Talladega Board of Educ., 518 F. Supp. 47 (N.D. Ala. 1981); Gladys v. Pearland Indep. School Dist., 520 F. Supp. 869 (S.D. Tex. 1981); Pinkerton v. Moye, 509 F. Supp. 107 (W.D. Va. 1981); Kruelle v. Biggs, 489 F. Supp. 169 (D. Del. 1980), *aff'd sub nom.* Kruelle v. New Castle School Dist., 642 F.2d 687 (3d Cir. 1981); Rowley v. Board of Educ., 483 F. Supp. 528 (S.D.N.Y. 1980), *aff'd per curiam*, 632 F.2d 945 (2d Cir. 1980), *rev'd and remanded*, 102 S. Ct. 3034 (1982); Armstrong v. Kline, 476 F. Supp. 583 (E.D. Pa. 1979), *remanded sub nom.* Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980), *cert. denied sub nom.* Scanlon v. Battle, 452 U.S. 968 (1980).

57. Kruelle v. New Castle School Dist., 642 F.2d 687 (3rd Cir. 1982); Springdale School Dist. No. 50 v. Grace, 656 F.2d 300 (8th Cir. 1981), *cert. denied*, 103 S. Ct. 2086 (1983); Battle v. Pennsylvania 629 F.2d 269 (3rd Cir. 1980), *cert. denied sub nom.* Scanlon v. Battle, 452 U.S. 968 (1980); Rowley v. Board of Educ., 632 F.2d 945 (2d Cir. 1980), *rev'd and remanded*, 102 S. Ct. 3034 (1982).

58. Kruelle v. Biggs, 489 F. Supp. 169, 173-74 (D. Del. 1980), *aff'd. sub nom.* Kruelle v. New Castle School Dist., 642 F.2d 687 (3d Cir. 1981).

59. Kruelle v. New Castle School Dist., 642 F.2d 687, 691, 693 (3d Cir. 1981).

60. "An appropriate education is one which provides each handicapped child educational opportunities commensurate with that provided other children in the public schools." Springdale School Dist. No. 50 v. Grace, 656 F.2d 300, 304 (8th Cir. 1981), *cert. denied*, 103 S. Ct. 2086 (1983); Gladys v. Pearland Indep. School Dist., 520 F. Supp. 869, 875 (S.D. Tex. 1981); Rowley v. Board of Educ., 483 F. Supp. 528, 534 (S.D.N.Y. 1980), *aff'd per curiam*, 632 F.2d 945 (2d Cir. 1980), *rev'd and remanded*, 102 S.Ct. 3034 (1982).

61. "Congress sought . . . to allow handicapped children to achieve at a minimum . . . self sufficiency . . ." Armstrong v. Kline, 476 F. Supp. 583, 603 (E.D. Pa. 1979), *remanded sub nom.* Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980), *cert. denied sub nom.* Scanlon v. Battle, 452 U.S. 968 (1980).

62. "[W]here possible, educational objectives for the handicapped should be set with reference to those objectives established for the nonhandicapped." Battle v. Pennsylvania, 629 F.2d 269, 277 (3d Cir. 1980), *cert. denied sub nom.* Scanlon v. Battle, 452 U.S. 968 (1980).

63. "[The] congressional intention [was] to educate all handicapped children as best as practicable." Pinkerton v. Moye, 509 F. Supp. 107, 113 (W.D. Va. 1981).

most deaf people, she has some residual hearing.[64] Both of Amy's parents are deaf and have raised her with the use of total communication.[65] Amy was enrolled in a public school kindergarten class in her neighborhood. In accordance with the requirements of federal law,[66] the school district prepared an IEP for Amy. She was provided with a wireles hearing aid. In February of that year, she was offered a sign language interpreter for a two week trial period. At the conclusion of the two weeks, the interpreter, Mr. Janik, concluded that Amy did not presently need his services. However, such recommendation was strictly limited to that kindergarten class for which his services were rendered.[67]

In the fall of Amy's first grade year, the school district compiled an updated IEP. The IEP did not provide her with a sign language interpreter. Her school records indicated that she was performing above the median for her class. In compliance with the Act,[68] the school district met with Amy's parents to discuss the

64. Residual hearing is a catchall phrase referring to the hearing available after damage to the auditory mechanism has already occurred. It can refer to useless sensitivity to low-pitched sounds, or to functionally useful remnants of hearing in the higher pitched ranges. Unless the amount and extent of residual hearing is defined, this information, given to parents, can create an unrealistic fantasy that the child will develop normal speech and language—that he will no longer be deaf.

Speech consists of a relatively narrow range of pitches, mostly between 300 and 4,000 cycles per second. The value of residual hearing depends, in part, upon a combination of loudness and pitch—the loudness required before the sound can be heard by the child and the pitch ranges (cycles per second) the child can hear. Therefore, the potential for learning speech through residual hearing may be nonexistent or it may be excellent. Interpretations concerning the significance of residual hearing in relation to speech and language should be given conservatively. Unfortunately, they are generally too optimistic.

Audiolgists have encountered persons who have normal hearing only at the higher frequency ranges 2,000 or 4,000 cycles per second. With this preservation of hearing these rare individuals have been able to develop normal language and speech. This is apparently because they can perceive consonant sounds accurately. Consonants carry the information of speech, and are heard as high frequency sounds. Unfortunately, most deaf and hard of hearing children have the least hearing in these high frequency ranges. (footnote omitted)

E. MENDELL & M. VERNON, THEY GROW IN SILENCE 34-35 (1971).

65. Total communication is a form of education for the deaf which utilizes a wide range of communication methods including mouthing words, amplification, signing, touching and visual cues. Rowley v. Board of Educ., 483 F. Supp. 528, 530 (S.D.N.Y. (1980).

66. 20 U.S.C. § 1414 (1976). Section 1414(a)(5) provides: "the local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually."

67. Rowley v. Board of Educ., 483 F. Supp. 528, 530 (S.D.N.Y. 1980).

68. 20 U.S.C. § 1415(b)(1)(C) (1976) provides:

The procedures required by this section shall include, but shall not be lim-

proposed IEP. The Rowleys agreed with the program in all but one respect. They wanted Amy to be provided with a sign language interpreter. Utilizing the safeguards afforded them under the Act, the Rowleys requested a hearing before an independent examiner.[69] Upon receiving an adverse finding, they brought a civil action in the United States District Court for the Southern District of New York.

The action sought reversal of the Commissioner of Education's finding.[70] The evidence indicated that due to Amy's handicap and limited interpretive skills, she was only discriminating approximately fifty-nine percent of class discussion.[71] With the use of "total communication," she would have been able to identify one hundred percent of the words spoken.[72]

The district court focused on developing a standard of "appropriate education." It determined that an "adequate" education, facilitating progress from grade to grade was insufficient. However, an education aimed at enabling a child to achieve his or her full potential was unrealistic since the best public schools lack the necessary resources for such a commendable goal.[73] Instead, the court established a standard requiring each handicapped child to be given an *opportunity* to achieve his full potential commensurate with the opportunity provided other children.[74] This standard requires the handicapped child's potential to be measured and compared to his or her performance; the resulting difference is then compared to the difference experienced by their nonhandicapped peers.[75]

As a result of these findings, the court found that although Amy was performing above the median of her class, she was not receiving an appropriate education.[76] The emphasis by the school district on her high academic performance was based on an

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ited to -written prior notice to the parents or guardian of the child whenever such agency or unit -
(i) proposes to initiate or change,or
(ii) refuses to initiate or change, the indentification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.

69. *Id.* at § 1415(b)(2).

70. Rowley v. Board of Educ., 483 F. Supp. 528 (S.D.N.Y. 1980), *aff'd per curiam*, 632 F.2d 945 (2d Cir. 1980), *rev'd and remanded*, 102 S. Ct. 3034 (1982).

71. The term "discriminating" refers to Amy's ability to discern the spoken words. Due to her handicap she could not differentiate between similar sounds. As a result she was unable to distinguish one word from another when they were phonetically similar.

72. Rowley v. Board of Educ., 483 F. Supp. 529, 532 (S.D.N.Y. 1980).

73. *Id.* at 534.

74. *Id.*

75. *Id.*

76. *Id* at 536.

erroneous understanding of the law.[77] The aid of an interpreter would have assisted Amy in understanding what was taught in class. It was therefore concluded that due to the denial of such services she was not being afforded the opportunity to achieve her full potential commensurate with the opportunity provided to other children.[78] As a result, the court held that the services of an interpreter should have been provided.[79]

The United States Court of Appeals for the Second Circuit affirmed this decision.[80] The court upheld the lower court's finding that Amy was entitled, by law, to the services of an interpreter.[81] However, the circuit court did limit the magnitude and effect of the lower court's decision.[82] The appellate court emphasized that a class action suit did not exist, and therefore its findings were limited to this case. The facts unique to this case, including Amy's family setting, her upbringing, and the experiences in the classroom,[83] made an interpreter necessary to "bring her educational opportunity up to the level of the educational opportunities offered to her peers."[84] Based on these facts, the court found Amy was entitled to a sign language interpreter during school periods when academic subjects were taught.

The United States Supreme Court in a six to three[85] decision reversed the district court's interpretation of the Act which mandated that handicapped children be provided with opportunities to maximize their potential commensurate with the opportunities provided nonhandicapped children.[86] It held that although such high standards would be commendable, they were not required by the Act.[87] This decision was based on an interpretation of Congressional intent that:[88] (1) the Act itself defined "free appropriate education" and therefore a new definition need not be

77. *Id.* at 534.
78. *Id.* at 534, 535.
79. *Id.* at 536.
80. Rowley v. Board of Educ., 632 F.2d 945 (2d Cir. 1980) (*per curiam*), *rev'd and remanded*, 102 S. Ct. 3034 (1982).
81. *Id.* at 948.
82. *Id.*
83. *Id.*
84. Rowley v. Board of Educ., 483 F. Supp. 528, 535 (S.D.N.Y. 1980).
85. This was actually a 5-1-1 decision. Justice Rehnquist delivered the majority opinion in which Chief Justice Burger, Justices Powell, Stevens and O'Connor concurred. Justice Blackmun concurred in holding only—not in rationale. He held that handicapped children were entitled to equal educational opportunities, but found that Amy was receiving such. Justice White filed a dissenting opinion in which Justices Brennan and Marshall concurred.
86. Board of Educ. v. Rowley, 102 S. Ct. 3034 (1982).
87. *Id.* at 3048.
88. *Id.* at 3041.

entertained,[89] (2) the Act required educational services to be offered first to those children receiving no education, and second to those receiving an indadequate education,[90] (3) the Act was adopted more to *open the door* of public education to handicapped children rather than guarantee any particular level of education once inside,[91] and (4) the Act mandated merely that some educational benefit be conferred upon the handicapped child.[92]

IV. EQUAL EDUCATIONAL OPPORTUNITIES

The *Rowley* case presented a question of statutory interpretation.[93] To answer this question the Court turned to the legislative history and intent behind passage of the Act. In making its determination the Court focused on three main areas: (1) what was meant by a "free appropriate education",[94] (2) whether the main purpose of the Act was to bring previously excluded handicapped children into the public education systems,[95] and (3) whether the intent was merely to open the door of public education to handicapped children, rather than guarantee any particular level of eduction once inside.[96] However, the majority has misconstrued this intent, thus abrogating the Congressional purpose. Congress passed this legislation intending to provide handicapped children equal educational opportunities.[97] The purpose for passage of this Act was twofold: first, as a supplement to previous failures to provide education to the handicapped,[98] and second, in direct response to the *PARC* and *Mills* decisions.

89. "Whether or not the definition is a 'functional' one, as respondents contend it is not, it is the principal tool which Congress has given us for the critical phrase of the Act." *Id.*

90. *Id.* at 3038, 3042; 20 U.S.C. § 1412(3) (1976).

91. *Rowley*, 102 S. Ct. at 3043.

92. *Id.* at 3048.

93. *Id.* at 3036.

94. The court granted certiorari to review the lower court's intrepretation of the Act. Such review required the consideration of what was meant by the Act's requirement of a "free apppropriate education." *Id.* at 3040.

95. "[T]he face of the statute evinces a congressional intent to bring previously excluded handicapped children into the public education systems . . ." *Id.* at 3042.

96. "Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Id.* at 3043.

97. *See e.g.*, 121 CONG. REC. 37,412 (1975) (remarks of Sen. Taft) "The goal of this legislation is to raise the quality of education for millions of handicapped children to a new standard of excellence and equal opportunity never before envisioned."; *id.* at 37,413 (remarks of Sen. Williams) "This measure fulfills the promise of the Constitution that there shall be equality of education for all people, and that handicapped children no longer will be left out."

98. *See supra* notes 11-13 and accompanying text.

A. Free Appropriate Education

A major area of dispute in the *Rowley* decision was whether the Act clearly defined the term "free appropriate education." Both the district court and the circuit court concluded the Act did not define "appropriate education." Rather it left the responsibility of giving meaning to the requirement to the courts and hearing officers.[99] As the Supreme Court noted, the term is clearly *defined*.[100] Although the Act defines the term,[101] the definition is not functional, and no guidance is offered to resolve controversies concerning the provision of a free appropriate education.[102] Therefore, the problem arises in ascertaining the meaning behind the definition. As the opinion states, "this one [definition] tends toward the cryptic rather than the comprehensive."[103] The Court found that although the definition may not be a functional one, it was the only one Congress supplied and therefore was to be used to determine the meaning of the phrase.[104]

The question remains whether Congressional intent required that such education meet some additional substantive standard.[105] As previously stated, Congress purposely did not mandate detailed programs. This policy was to facilitate meeting the unique needs of individual handicapped children. Due to this concern no substantive standards were detailed in the EAHCA.[106] Therefore, the Court turned to the legislative history to make their determination.

Although the Court looked to the legislative intent in reaching its decision,[107] it failed to acknowledge the importance Congress placed upon providing equal educational opportunity to handi-

99. *See* Rowley v. Board of Educ., 632 F.2d 945, 947 (2d Cir. 1980); Rowley v. Board of Educ., 483 F. Supp. 528, 533 (S.D.N.Y. 1980).

100. Board of Educ. v. Rowley, 102 S. Ct. 3034, 3041 (1982). "It is beyond dispute that, contrary to the conclusions of the courts below, the Act does expressly define 'free appropriate public education'." *Id.* 20 U.S.C. § 1401(18) (1976) provides:

> The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

101. *See* 20 U.S.C. § 1401(18) (1976).

102. Board of Educ. v. Rowley, 102 S. Ct. 3034, 3041 (1982).

103. *Id.*

104. *Id.*

105. *Id.* at 3042.

106. Note, *Springdale School District No. 50 v. Grace: "Appropriate Education" Under the Education For All Handicapped Children Act*, 15 CREIGHTON L. REV. 950, 957 (1982).

107. *Rowley*, 102 S. Ct. at 3042.

capped children.[108] Instead it focused on Congress' desire to serve those handicapped children who were not presently being served and providing them with a "meaningful" education.[109] This interpretation does not give due deference to the intent behind passage of the EAHCA, nor the intent behind usage of the phrase "free appropriate education." As a result, the Court misinterpreted the phrase and set a lower standard than Congress had intended.

While the Court did provide that handicapped children were entitled to "meaningful" instruction which would permit the child to benefit educationally from such instruction,[110] this term seems nebulous at best. "Meaningful" is no more enlightening than "appropriate."[111] The Court held that since Amy was provided with some specialized instruction from which she received some benefit, and because she passed from grade to grade, she was receiving a meaningful and therefore appropriate education.[112] This holding falls far short of the standard of meeting the "unique needs" of handicapped children as provided for in the EAHCA.[113] Amy was achieving at a level above the median of her class, even with her handicap. Yet she was only grasping fifty-nine percent of the spoken words. With the aid of the interpreter, she would have been able to achieve one hundred percent understanding[114] and her unique needs would have been met. The Court found, however, that receiving an education which allows a child to advance from grade to grade is sufficient to comply with the provisions of the EAHCA.[115] Such a finding carries the implication that educa-

108. *See e.g.* 121 CONG. REC. 19,483 (1975) (remarks of Sen. Randolph) "Senate bill 6 offers an equal educational opportunity to our 8 million handicapped children."; *id.* (remarks of Sen. Stafford) "[E]ducation should be equivalent, at least, to the one those children who are not handicapped receive."; *id.* at 19,485 (remarks of Sen. Williams) "[T]he Supreme Court of the United States fully opened the door for all children to be guaranteed equal educational opportunites."; *id.* at 19,492 (remarks of Sen. Williams) "Congress has a responsibility under the Consititution to assure equal protection of the laws and to see that all persons are assured equal opportunity."; *id.* at 19,503 (remarks of Sen. Cranston) "Its enactment will signify a new beginning and the broadening of equal opportunity for all our children."

109. "Congress sought primarily to make public education availbable to handicapped children. But . . . did not impose upon the states any greater substantive educational standard than would be necessary to make such access meaningful. *Rowley*, 102 S. Ct. at 3043.

110. *Id.* A "free appropriate education" is satisfied by providing handicapped children personalized instruction which would permit the child to benefit educationally from that instruction. *Id.* at 3049.

111. *Id.* at 3055 (White, J., dissenting).

112. *Id.* & n. 2. *See supra* note 73 and accompanying text. As the district court found in Rowley v. Board of Educ., 483 F. Supp. 528, 534 (S.D.N.Y. 1980) merely facilitating progress from grade to grade is insufficient to meet the mandates of the Act.

113. *Rowley*, 102 S. Ct. at 3055 (White, J., dissenting).

114. Rowley v. Board of Educ., 483 F. Supp. 528, 532 (S.D.N.Y. 1980).

115. Board of Educ. v. Rowley, 102 S. Ct. 3034, 3049 (1982).

tional institutions should strive merely to educate their students to allow them to advance from grade to grade. This view is counter to our society's stress on education.[116] Historically our society has always emphasized the importance of intellectual attainment.

In the words of Senator Jacob Javits, of New York, "Education historically has been one of the building blocks upon which this Nation's strength is based."[117] "The education of our citizens has been one of the foundations upon which the vitality and strength of our Nation have been based. The contribution of handicapped citizens . . . toward the improvement of life for all Americans, has been immeasurable."[118] In keeping with this philosophy, merely providing a child educational services which allow him to advance from grade to grade is a tremendous disservice to the child as well as to our society. In *Brown v. Board of Education*,[119] the United States Supreme Court expounded on the importance our society places on education.

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsiblities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[120]

These words exhibit the significance of education in today's society. The words used by Chief Justice Warren in *Brown*, evidence his concern for quality education as the "most important function of state and local governments."[121] He refers to it as the "foundation of good citizenship" and to its importance in preparing children to succeed in life.[122] With such importance placed on education, schools should aim for *higher* standards of performance, not lower. Denying any person an education geared toward the highest achievement possible would defeat society's purpose for educating its citizens.

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116. *See generally*, 121 CONG. REC. 19,493 (1975) (remarks of Sen. Javits).
117. *Id.*
118. *Id.* at 37,416 (remarks of Sen. Javits). Franklin D. Roosevelt and Thomas Edison are mentioned as two of the nation's handicapped citizens who have contributed much to the improvement of life spoken of.
119. 347 U.S. 483 (1954).
120. *Id.* at 493.
121. *Id.*
122. *Id.*

The Congressional Record of this Act is replete with references to equal educational opportunities for handicapped children.[123] The dissenting opinion[124] in *Rowley* focused on the language in the Congressional hearings as support for its rationale.[125] However, the majority opinion did not address these passages. Rather they relied heavily on other reasons for passage of the EAHCA. Due to the prevalence of the term "equal educational opportunity" throughout the history it is difficult to view them as passing references or isolated phrases, as the majority appears to do.[126] As a result of the frequent references, the dissenters found that "legislative history thus directly supports the conclusion that the Act intends to give handicapped children an educational opportunity commensurate with that given other children."[127]

Furthermore, the Court gave no consideration to federal regulations promulgated under the Act.[128] The regulations mandate that recipients of federal funds shall provide a free appropriate public education to handicapped persons within their jurisdiction.[129] The regulations further provide that an appropriate education is one that meets the individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met.[130] The regulations clearly define what the standard of an appropriate education is. This definition is in direct conflict with the findings of the Court. The standard fixed by the regulations is geared to meeting the needs of handicapped children as adequately as the needs of nonhandicapped children are met. This standard is the same one the Rowleys sought to be imposed. It is a stricter test for appropriate education than the one the Court imposed. Merely providing some "meaningful" education to those children currently not being served, contrary to the court's holding, does not meet that standard.

B. Children to Be Served

The Court determined the Act was to provide services first to handicapped children not presently receiving an education and second to severely handicapped children receiving an inadequate

123. *See supra* notes 97, 108 and acompanying text and *see infra* notes 155, 175 and accompanying text.

124. Board of Educ. v. Rowley, 102 S. Ct. 3034 (1982). Justice White, with whom Justices Brennan and Marshall joined, wrote the dissent.

125. *Id.* at 3054-55 (White, J., dissenting).

126. *Id.* at 3050 n. 26.

127. *Id.* at 3054-55 (White, J., dissenting).

128. 34 C.F.R. § 104 (1982).

129. *Id.* at § 104.33(a).

130. *Id.* at § 104.33(b)(1).

education.[131] The Court focused heavily upon the intent of Congress to bring children previously excluded from publicly supported education under the protection of the EAHCA.[132]

There are numerous references throughout the legislative history regarding the present lack of services offered to a large number of handicapped children.[133] The Court interpreted this language as an intention of providing these children *access* to schools, rather than striving to afford some level of beneficial educational services once inside.[134] Additionally, the Court held that the frequent references to the number of handicapped children receiving an inadequate or no education was confirmation that Congress' intent was primarily to make public education *available* to handicapped children.[135]

Serving children previously excluded was one of the goals of the EAHCA, however, it was not the ultimate goal.[136] The legislative intent references many other reasons behind passage of the Act.[137] The House and Senate hearings did consistently refer to the large number of handicapped children not being served.[138] But, these references were often linked to statements urging equal educational opportunities.[139] Congress' intention was not merely to bring handicapped children into the schoolhouse, but to benefit them once inside.[140] Equal educational opportunities for handicapped children was a much stronger focus in the hearings than serving those previously not served.[141]

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131. Board of Educ. v. Rowley, 102 S. Ct. 3034, 3038, 3042 (1982). 20 U.S.C. § 1412(3) (1976).

132. *See supra* note 95 and accompanying text.

133. Many references are made to the fact that of the eight million handicapped children in our nation, only 3.9 million are receiving an appropriate education, and 1.75 million are receiving no education whatsoever. *See e.g.*, 121 CONG. REC. 19,482 (1975) (remarks of Sen. Randolph); *id.* at 19,494 (remarks of Sen. Javits); *id.* at 19,504 (remarks of Sen. Schweiker); *id.* (remarks of Sen. Humphrey); *id.* at 37,417 (remarks of Sen. Schweiker); *id.* at 37,420 (remarks of Sen. Hathaway).

134. *See supra* note 96 and accompanying text.

135. *Rowley*, 102 S. Ct. at 3042.

136. *See supra* notes 97, 108 and accompanying text, and *see infra* notes 155, 175 and accompanying text.

137. *See supra* notes 97, 98 and 108 and accompanying text, and *see infra* notes 143, 155 and 175 and accompanying text.

138. *See supra* note 133 and accompanying text.

139. The Court's opinion relies heavily on the statement . . . that, at the time of enactment, one million of the roughly eight million handicapped children . . . were excluded entirely from the public school system and more than half were receiving an inappropriate education. But this statement was often linked to statements urging equal educational opportunity. That is, Congress wanted not only to bring handicapped children into the schoolhouse, but also to benefit them once they had entered.

Rowley, 102 S. Ct. at 3054 n. 1 (citations omitted) (White, J., dissenting).

140. *Id.*

141. *See supra* notes 97, 108, and *see infra* notes 155, 175.

During the Senate debates on passage of the Act, Senator Stafford of Virginia set forth the priorities of first serving those handicapped children receiving no services, and second those receiving only minimal services. This was merely a starting point for *implementation*, not the underlying force behind promulgation of the Act, nor the ultimate goal of the Act.[142] This prioritization was discussed only after the need for equivalent education for handicapped children was recognized. It was that goal which was foremost in Senator Stafford's concern.[143] The priority spoken of by Senator Stafford refers to carrying out the EAHCA rather than reasons for enacting it. He clearly stated that since we must have a place to start, such priorities are appropriate.[144] It is implicit within these words that the goal of achieving equal educational opportunities must be attempted before a priority for receiving such services could be entertained.

C. *Opening the Door*

The Congressional Record of the House and Senate debates regarding passage of this Act is the only source of history that can be interpreted to determine the legislative intent. The theme pervading these debates emphasizes providing handicapped children, who have formerly been improperly served, with educational opportunities equal to those received by their nonhandicapped peers.[145] However, in *Rowley* the Court gave no deference to this purpose. Instead it found that "Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education."[146] This finding, along with other similar language[147] in the decision, renders the Act a mere facade of guaranteeing education to handicapped children.

Education has been defined as something substantially more

142. [S]ince we must have a place to start, it is appropriate that we give priority to those who are receiving no services at all first, and then try to reach those with the most severe handicaps who have traditionally received only minimal attention second. This is what the bill sets at its priorities.
121 CONG. REC. 19,483 (1975) (remarks of Sen. Stafford).

143. "We can all agree that all handicapped children should be receiving an education. We can all agree that that education should be equivalent, at least, to the one those children who are not handicapped receive." *Id.*

144. *See supra* note 142 and accompanying text.

145. *See supra* notes 97, 108 and accompanying text, and *see infra* notes 155, 175 and accompanying text.

146. Board of Educ. v. Rowley, 102 S. Ct. 3034, 3048 (1982).

147. In two other parts of the Court's decision it stated similar language: "[T]he intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level once inside." *Id.* at 3043. "[T]he Act imposes no clear obligation upon recipient States beyond the requirement that handicapped children receive some form of specialized education. . . ." *Id.* at 3045.

than mere access to schools.[148] If the Congressional intent was merely to provide access to schools which would confer some educational benefit,[149] with no further burden upon the states, such would be a meaningless, politically self-serving measure of Congress.[150] This type of action, although purportedly providing educational opportunities for handicapped children in response to growing public concern,[151] in reality does not better the children's position. It would serve only to pacify concerned constituents by giving the appearance of improving educational opportunities of the handicapped when in fact no improvements are actually being provided. This result leads to the conclusion that the Supreme Court misconstrued Congress' intent. The legislative history indicates that Congress did not intend the EAHCA to merely provide access to educational opportunities.[152]

As stated in the Senate Report: "It can no longer be the policy of the Government to merely establish an unenforceable goal of requiring all children to be in school. [Senate bill] 6 takes positive necessary steps to ensure that the rights of children and their families are protected."[153] In the hearings on the Act, Senator Harrison Williams of New Jersey, stated, "Congress has a responsibility under the Constitution to assure equal protection of the laws and to see that all persons are assured equal opportunity. For handicapped children, this means, at the very least, that they must be educated."[154] This sentiment is expressed continuously throughout the Congressional Record.[155]

148. "Education: 1. [T]he act or process of educating or of being educated." "Educate: 2a: [T]o develop . . . by fostering to varying degrees the growth or expansion of knowledge, wisdom, desirable qualities of mind or character, physical health, or general competence especially by a course of formal study or instruction." WEBSTER'S NEW INTERNATIONAL DICTIONARY 723 (3d ed. 1971).

149. "Implicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education . . . confer some educational benefit upon the handicapped child." *Rowley*, 102 S. Ct. at 3048.

150. *Id.* at 3053 (Blackmun, J., concurring).

151. *See supra* notes 56-57 and accompanying text.

152. *See supra* notes 97, 108 and accompanying text, and *see infra* notes 155, 175 and accompanying text.

153. S. REP. NO. 168, 94th Cong., 1st Sess. 9, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1433.

154. 121 CONG. REC. 19,492 (1975).

155. *See e.g.*, 121 CONG. REC. 19,494 (1975) (remarks of Sen. Javits) "[H]andicapped children, while entitled to the same opportunity to an education as all other children, are nevertheless, a unique group."; *id.* at 19,497 (remarks of Sen. Stone) "[T]his approach . . . will most fairly achieve the ultimate goal, that is, adequately educating the handicapped child."; *id.* at 19,503 (remarks of Sen. Cranston) "[Senate Bill] 6 . . . will promote quality educational opportunities for handicapped children."; *id.* at 19,504 (remarks of Sen. Schweiker) "The Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity."

The Court found the Act was passed with the intent of opening the door to education rather than guaranteeing any particular level once inside.[156] This finding is superfluous; a guarantee of a predetermined specific level of achievement was not the goal of the Act.[157] The intended goal was to offer equal educational opportunities to all children.[158] The Act attempts to equalize the *opportunities* of handicapped children with those received by nonhandicapped children, not to guarantee that they will perform at any particular level.

Once a child has gained access to a public school, his achievement level is personal.[159] The provision of a free appropriate education was not contemplating having children achieve a preset level. They only had to be offered the same *opportunities* to achieve offered to their nonhandicapped peers.[160] As the Court points out in *Rowley*, strict equality of educational services would be counter-productive.[161] Students, handicapped or not, assimilate information differently. The quest is not to guarantee that handicapped children *achieve* at the same level as their nonhandicapped peers. Rather, they must be provided the same opportunities for such achievement.[162] All children are different, and no one expects any two to perform equally. The Act merely provides the *means* by which handicapped children can strive to achieve at the level of their nonhandicapped peers.[163] This opportunity is provided through the requirement of a "free appropriate public education."[164] As enunciated by Rep. Minish of New Jersey, the co-sponsor of the bill, "It is long past time that the Government recognize its responsibility to see that each individual has the opportunity to reach his or her highest potential."[165]

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156. Board of Educ. v. Rowley, 102 S. Ct. 3034, 3043 (1982).

157. *See* Springdale School Dist. No. 50 v. Grace, 656 F.2d 300, 305 (8th Cir. 1981), *cert. denied*, 103 S. Ct. 2086 (1983).

158. *See supra* notes 97, 108, and 155 and accompanying text and *see infra* note 175 and accompanying text.

159. *See Springdale*, at 305, *cert. denied*, 103 S. Ct. 2086 (1983).

160. *Id.* at 304-05; Battle v. Pennsylvania, 629 F.2d 269, 277 (3rd. Cir. 1980), *cert. denied sub nom.* Scanlon v. Battle, 452 U.S. 968 (1980).

161. *Rowley*, 102 S. Ct. at 3047. "[F]urnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement of a 'free appropriate education'".

162. Springdale School Dist. No. 50 v. Grace, 656 F.2d 300, 305 (8th Cir. 1981), *cert. denied*, 103 S. Ct. 2086 (1983); Armstrong v. Kline, 476 F. Supp. 583, 603-04 (E.D. Pa. 1979) *remanded sub nom.* Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980), *cert. denied sub nom.* Scanlon v. Battle, 452 U.S. 968 (1980).

163. *Id.*

164. 20 U.S.C. § 1412(1) (1976).

165. 121 CONG. REC. 23,709 (1975).

As the Third Circuit found in a recent case,[166] whenever possible educational objectives for the handicapped should be set with reference to those objectives set for nonhandicapped.[167] A handicapped child may be expected to attain educational achievements commensurate with normal children upon the provision of special services. A blind or deaf child, for example, may be provided with the services of braille books or a sign language interpreter.[168] This finding is further support that no guarantee of previously set specific levels of achievement was anticipated. Rather, the Congressional intent in adopting the EAHCA was to offer equal educational *opportunities* to all children.

Again the Court glossed over the Congressional intent in this aspect. Senator Williams, the chief sponsor of the bill, cited *Brown v. Board of Education*[169] as support for providing equal educational opportunity to all children.[170] "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity . . . is a right which must be made available to all on equal terms."[171] *Brown* is the leading case on equal educational rights. It calls for providing education to all on equal terms. Opening the door for handicapped children to receive an education without giving them the same opportunity to achieve given their nonhandicapped peers denies them this right.

In *Lau v. Nichols*,[172] non-English speaking Chinese students brought a class action suit seeking relief against unequal educational opportunites. The students were placed in the same classes and given the same curriculum as English speaking students. No provisions for translation to Chinese were afforded these students. The United States Supreme Court held that merely providing students similar facilities, textbooks, teachers and curriculum foreclosed any meaningful education for non-English speaking students.[173] A fortiori, merely opening the door to education without offering equal educational opportunites would have the same effect upon handicapped children. If a handicapped child were given access to public schools, but once inside offered nothing to aid them based on their individual needs, they too would be foreclosed from a meaningful education. Just as textbooks and

166. Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1982), *cert. denied sub nom.* Scanlon v. Battle, 452 U.S. 968 (1980).
167. *Id.* at 277.
168. *Id.*
169. 347 U.S. 483 (1954).
170. 121 CONG. REC. 19,485 (1975).
171. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).
172. 414 U.S. 563 (1974).
173. *Id.* at 566.

curriculum offered in a foreign language are useless, so is giving a blind child nonbraille books, or placing a deaf child in a class without providing facilities to enable him to hear.

The Court in *Lau* also held that imposing a requirement that before a child can effectively participate in the education program he must already have acquired those basic skills is to make a mockery of public education.[174] Placing a child in an education program without supplying an effective means of learning also makes a mockery of public education.

The intention of providing equal educational opportunity is expressed throughout the Act by its supporters.[175] Once again it is difficult to imagine an intent other than equal educational opportunity for handicapped children. The Congressional hearings on the Act consistently refer to provisions of equality and maximization of potential.[176]

V. FUTURE RAMIFICATIONS

A less stringent standard than equal opportunity may have devastating effects upon other handicapped children. As Justice Blackmun points out in his concurrence, Amy was given more than a teacher with a loud voice.[177] She was actually given the assistance of other hearing aids. Had she merely been given a teacher with a loud voice she would not have been offered the same opportunity as her nonhandicapped peers. Yet viewing Amy's program as a whole, she was offered opportunities to understand and participate in the classroom substantially equal with those offered her classmates. She was able to achieve at a level above the median of her class with the assistance of other aids.[178] In Amy's particular case the result is not disastrous.

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174. *Id.*

175. *See e.g.*, 121 CONG. REC. 19,482 (1975) (remarks of Sen. Randolph) "meeting the goal of providing full educational opportunities for all handicapped children"; *id.* at 19,483 "offers an equal educational opportunity to our eight million handicapped children."; *id.* at 19,503 (remarks of Sen. Cranston) "will promote quality educational opportunites for handicapped children"; *id.* at 37,412 (remarks of Sen. Taft) "The goal of this legislation is to raise the quality of education for millions of handicapped children to a new standard of excellence and equal opportunity never before envisioned;" *id.* at 37,413 (remarks of Sen. Williams) "This mesure fulfills the promise of the Constitiution that there shall be equality of education for all people, and that handicapped children no longer will be left out."; *id.* at 37,029 (remarks of Rep. Minish) "It is long past time . . . that the Government recognize its responsibility to see to it that each individual has the opportunity to reach his or her highest potential"; *id.* at 23,709 (remarks of Rep. Biaggi) "Every child has a right regardless of handicap to realize his fullest potential, no matter how great or how small."

176. *See supra* notes 97, 108, 155 and 175.

177. Rowley v. Board of Educ., 102 S. Ct. 3034, 3053 (1982) (Blackmun, J., concurring).

178. *Id.*

However, if the courts interpret *Rowley* as setting a minimum standard of "access and some benefit," other handicapped children will be denied the opportunity to achieve their potential. Amy is an intelligent child whose handicap does not prevent her from achieving. Although as stated, she is not achieving as well as she would with the assistance of an interpreter. A child with a more severe handicap would be denied the opportunity to achieve if supplied only with these minimums.

CONCLUSION

The EAHCA is a provision long awaited by handicapped children. It purports to provide handicapped children the opportunities to achieve an education which they have long been denied.[180] However, the decision reached in *Rowley* may have the deleterious effect of denying this newly acquired right.

The EAHCA came about in response to the *PARC* and *Mills* decisions. It was the first major attempt to provide appropriate education to handicapped children. However, the courts have been unable to reach a determination of the meaning of "free appropriate education," until *Rowley*.

A review of the cases dealing with the Act indicates a tendency to provide more opportunities to handicapped children. The legislative history indicates a desire to offer equal educational opportunites to handicapped children. Yet the *Rowley* Court found that a more lenient standard for the states to follow was the intent of Congress.

The Court found that rather than providing equal educational opportunities to handicapped children the intent was merely to provide some "meaningful" education. Yet a close scrutiny of the legislative history indicates frequent references to "equal educational opportunities." These frequent references make it clear that the Congressional intent was to provide equal educational opportunities.

In further construing the legislative intent, the Court found that the major intentions of Congress were: (1) primarily to make public education available to those students previously excluded, and (2) to give *access* to public schools to handicapped children.

The legislative history behind passage of the Act addressed the problems facing handicapped children. The Senators and Representatives repeatedly spoke of providing handicapped children with educational opportunities equal to those offered to non-

179. Rowley v. Board of Educ., 483 F. Supp. 528, 532 (S.D.N.Y. 1980).
180. 20 U.S.C. § 1401-1461 (1975).

handicapped children. The Congressional debates spoke of the historical exclusion and inequality from education, and sought to remedy it. The legislative intent clearly provides that handicapped children are to be provided equal educational opportunities. The Court has misinterpreted this intent resulting in a standard for states to follow which is much more lenient than Congress anticipated.

Unless the decision of the Court is given a broad interpretation by the lower courts, handicapped rights will be dealt a serious blow. The Court needs to re-examine the legislative intent and provide handicapped children their entitled right of equal educational opportunities in order to maximize their potential commensurate with the opportunities provided nonhandicapped children.

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